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October 23, 1996

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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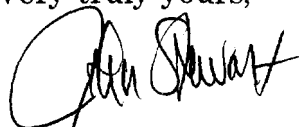
Re: Guidelines for Evaluating the Environmental
Effects of Radiofrequency Radiation, ET Docket No. 93-62

Dear Mr. Caton:

Transmitted herewith for filing with the Commission on behalf of the Electromagnetic Energy Association are an original and eleven copies of its Reply to Opposition to Petition for Reconsideration.

Should there be any questions regarding this matter, please communicate with this office.

Very truly yours,



John I. Stewart, Jr.

Enclosures

cc: Honorable Reed Hundt, Chairman
Honorable James H. Quello
Honorable Rachelle B. Chong
Honorable Susan Ness

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

OCT 23 1996

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of)

Guidelines for Evaluating the)
Environmental Effects of)
Radiofrequency Radiation)

ET Docket No. 93-62

**REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION**

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ASSOCIATION

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ET Docket No. 93-62

To: The Commission

**REPLY TO OPPOSITION TO
PETITION FOR RECONSIDERATION**

Pursuant to Section 1.429(g) of the Commission's Rules, the Electromagnetic Energy Association ("EEA"),¹ by its attorneys, replies to the "Comments on, some statements in support of, and some statements in opposition to some requests in petitions for reconsideration Regarding FCC Report and Order FCC 96-326" (the "Opposition") filed by David Fichtenberg ("Opposer") in this proceeding. Opposer is flatly wrong in his reading of the Telecommunications Act of 1996 and in his arguments against comprehensive preemption and the adoption of the 1992 ANSI/IEEE standard.

¹ EEA is a coalition of companies and trade associations representing a broad spectrum of communications businesses, consumer products and industrial applications that use electromagnetic energy. EEA and its members have participated actively in this proceeding, and EEA filed a Petition for Reconsideration urging adoption of a comprehensive preemption rule and an RF exposure standard based consistently on the 1992 ANSI/IEEE standard.

I. OPPOSER'S ARGUMENTS AGAINST COMPREHENSIVE PREEMPTION ARE BASED ON INCORRECT READINGS OF THE TELECOMMUNICATIONS ACT AND AN INCORRECT LEGAL STANDARD.

The Opposer asserts that the language and legislative history of the Telecommunications Act of 1996 explicitly preclude preemption of state and local regulation of non-personal wireless RF transmitters. Opposition at 9-17. This assertion, however, is based on clear misreadings of the Act and its legislative history.

For example, Opposer argues that Congress expressly stated its intention that RF transmitters be evaluated on the basis of "case by case" determinations rather than being subject to broad federal preemption. Opposition at 10, 13. But on a closer reading of the Conference Report regarding Section 704, it becomes clear that the statement that "[i]t is the intent of this section that bans or policies that have the effect of banning personal wireless services or facilities not be allowed and that decisions be made a case-by-case basis" refers not to federal preemption under Section 332 (c)(7)(B)(iv), but to state and local regulations under Section 332 (c)(7)(B)(i). See H.R. Rep. No. 104-458 at p. 208.

Indeed, with respect to personal wireless services, there can be no question that Congress intended -- and directed -- the FCC to preempt absolutely all state and local regulation that was inconsistent with the FCC's own RF exposure standards. The reference to "case by case" evaluations in the legislative history refers to adverse actions by state and local authorities with respect to personal wireless facilities that were based on criteria other than environmental effects.

Similarly, the Opposer misreads language in Section 253(b) of the Act as expressly precluding preemption of state and local RF regulation of non-personal wireless facilities. Opposition at 16-17. By its own plain terms ("[n]othing in this section shall affect...), Section 253(b) is limited to qualifying the prohibition in Section 253(a) against state and local barriers to entry for telecommunications service providers. It has nothing to do with state and local RF regulation of non-personal wireless facilities, as can be seen by the fact that Section 704 preempts state and local regulation of transmitter facilities with respect to environmental effects.

Opposer's attempts to create an express statutory bar by misreading the legislation thus fail. Congress simply did not address the question of preemption with respect to non-personal wireless facilities, in the Act or in its legislative history. The question thus is not whether the Act expressly forbids comprehensive preemption, but whether the Commission may rationally or lawfully subject identically situated licensees to inconsistent RF exposure requirements through arbitrarily truncated preemption rules.

The Opposer argues that EEA seeks preemption "regardless of its subject, scope or effect, and regardless of whether such regulation would stand as an obstacle to the objectives of Congress." Opposition at 10. But this is simply wrong. EEA explained in its Petition that the accomplishment of important federal communications policies regarding DTV, LMDS, ITFS and other non-personal wireless services would be unjustifiably impeded by application of the

FCC's partial preemption rule. EEA Petition for Reconsideration at 8-11.

Opposer also argues that the fact that the development of scientific knowledge is a gradual process somehow means that state and local RF regulation should not be preempted. Opposition at 11-12. But accommodating this process should not require the FCC and its licensees to endure a patchwork quilt of inconsistent regulations that thwart implementation of important federal policy objectives. Indeed, as EEA has pointed out, the Commission has in other contexts solved the problem of ongoing technological development by adopting industry-consensus ANSI standards and allowing for updating the FCC rules to reflect changes in those standards. EEA Petition for Reconsideration at 13. As the Department of Defense also suggests, the same approach is appropriate here. See Petition for Reconsideration of the Department of Defense at pages 4,5.

Opposer's arguments about supposed "non-thermal" effects of RF energy are irrelevant and illogical. The assertion that the FCC, in concluding that its RF standards are "sufficient to protect the public health," "could not have meant" protection against all harmful health effects (Opposition at 12) is simply wrong. Surely Congress and the FCC, in expressly preempting state and local regulation based on the "environmental effects" of personal wireless service transmitters that meet FCC standards, could not have intended to allow all local authorities to prohibit the construction of a fully compliant transmitter anyway, simply by asserting a belief that health effects resulting from RF exposure lower than FCC limits are non-thermal rather than thermal. Such an unjustified interpretation

would completely gut Congressionally mandated preemption for personal wireless services, and could not possibly form a valid basis for denying preemption for non-personal wireless facilities.

A similar illogic infects Opposer's final argument against preemption. In responding to Ameritech's Petition, Opposer argues that the absence of the word "operation" from the final version of Section 704 represents a definite determination by Congress to prohibit preemption of state and local RF regulation of the operation of personal wireless facilities. Opposition at 13-16. Opposer provides no evidence, except for the missing word, that Congress actually made such a decision, but the inference that Opposer would have the Commission adopt is absurd. Under Opposer's interpretation, a locality could not prevent the siting and construction of an FCC-licensed personal wireless facility that meets the FCC's RF exposure standards, but could prevent the licensee from operating that facility! A more complete evasion of Congressionally mandated preemption is hard to imagine.

Unlike its argument against Ameritech, Opposer does not even present evidence of an omitted word to support its argument that Congress affirmatively intended to prohibit the FCC's adoption of the same preemption rule with respect to non-personal wireless services, as EEA requests. For the reasons spelled out in EEA's Petition, the Commission should apply preemption consistently to all licensed transmitters that are in compliance with the Commission's RF exposure standard.

II. OPPOSER'S ARGUMENT THAT THE FCC'S RF STANDARDS SHOULD BE MODIFIED TO COVER "NON-THERMAL" EFFECTS IS BASELESS.

Opposer's comments provide a clear example of the consequences of the decision by the FCC to adopt a hybrid of 1986 NCRP and 1992 ANSI/IEEE standards (what Opposer refers to as "FCC 1996") rather than accepting the results of the scientific consensus represented by the 1992 ANSI/IEEE standard, as was overwhelmingly favored by the parties commenting in this rulemaking proceeding. Opposer argues essentially that the fact that an employee of the EPA now states that the FCC standard does not provide adequate protection against potential "non-thermal" consequences of radiofrequency emissions, besides gutting the FCC's and Congress's preemption orders, should result in a further modification to FCC 1996. Opposition at 22-23. This modification would impose an "as low as reasonably achievable" exposure standard. Id. There can be no justification for adopting such a modification.

The subject of nonthermal effects was explicitly addressed in the 1992 ANSI/IEEE standard, at p. 23 of the rationale:

Non-thermal effects . . . are also mentioned as potential health hazards. The members . . . believe the recommended exposure levels should be safe for all, and submit that no reliable scientific data exist indication that:

. . .

(4) Nonthermal (other than shock) or modulation-specific sequelae of exposure may be meaningfully related to human health.

EPA's assertion of possible "health effects" from exposure to RF fields that were assumed to be nonthermal was made in a preliminary draft report that pre-dated

the 1992 ANSI/IEEE standard. That assertion was rejected by the Agency's Scientific Advisory Board after two years of public comment and critique. SAB Report: Potential Carcinogenicity of Electric and Magnetic Fields (EPA-SAB-RAC-92-013, January 29, 1992).

EEA again urges the Commission to reconsider its Report and Order, to apply its preemption rule consistently, and to adopt the 1992 ANSI/IEEE standard in its entirety in place of the hybrid "FCC 1996." Such an approach will allow the continuing development of new knowledge through a process of scientific consensus, and the application of a consistent federal standard to all RF transmitters.

Respectfully submitted,

ELECTROMAGNETIC ENERGY
ASSOCIATION

By: 

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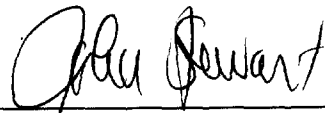
Its Attorneys

October 23, 1996

CERTIFICATE OF SERVICE

I, John I. Stewart, Jr., hereby certify that I have caused a copy of the foregoing **Reply to Opposition to Petition for Reconsideration** to be mailed by first-class mail, postage prepaid, this 23rd day of October, 1996, to:

David Fichtenberg
Ad-hoc Association of Parties Concerned
About the Federal Communications
Commission's Radiofrequency Health and
Safety Rules
P.O. Box 7577
Olympia, Washington 96707-7577



John I. Stewart, Jr.

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